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7 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

8 UNITED STATES OF AMERICA,)

9 Plaintiff,)

10 vs.)

11 KEVIN WILLIAM HARPHAM,)

12 Defendant.)

11-CR-042-JLQ

United States' Sentencing
Memorandum

13
14 Plaintiff, United States of America, by and through Michael C. Ormsby,
15 United States Attorney for the Eastern District of Washington, and Joseph H.
16 Harrington and Thomas O. Rice, Assistant United States Attorneys for the Eastern
17 District of Washington, respectfully submits the following sentencing
18 memorandum.

19 INTRODUCTION

20 On April 22, 2011, the grand jury returned a four-count Superseding
21 Indictment charging the Defendant with the Attempted Use of a Weapon of Mass
22 Destruction, in violation of 18 U.S.C. § 2332a(2) (Count 1); Possession of an
23 Unregistered Destructive Device, in violation of 26 U.S. C. § 5861(d) (Count 2);
24 Attempt to Cause Bodily Injury With an Explosive Device Because of Actual or
25 Perceived Race, Color, or National Origin of a person, in violation of 18 U.S. C. §

249 (Count 3); and Use of a Firearm (a destructive device) in Relation to a Crime of Violence, in violation of 18 U.S.C. § 924(c)(1)(B) (Count 4). The Defendant entered a Plea Agreement pursuant to Fed. R. Crim. P. 11(c)(1)(C) and pleaded guilty to Counts 1 and 3. The Plea Agreement provides, *inter alia*, a binding sentencing range of 27 to 32 years along with a life term of supervised release. By Order, dated November 9, 2011, this Court accepted the Plea Agreement.

The United States strongly recommends that this Court impose a sentence of 32 years of incarceration.

DISCUSSION

Generally, a sentencing court must engage in a two-step process when imposing a sentence. The first step requires a court to calculate properly the advisory Guidelines sentencing range. *See United States v. Cantrell*, 433 F.3d 1269, 1279-80 (9th Cir. 2006). The second step requires a sentencing court to impose a “reasonable” sentence in light of all the factors under 18 U.S.C. § 3553(a). *See United States v. Marcial-Santiago*, 447 F.3d 715, 717 (9th Cir. 2006).

A. Step One: The Guidelines Range is Supplanted by the Agreed Sentence

The United States Probation Office has prepared an amended Presentence Investigation Report (“PSR”) and an Addendum, both dated November 21, 2011. It appears the PSR is complete and accurate. Neither the Defendant nor the United States have an objection to the Guidelines calculation.¹

The PSR calculates the Defendant’s adjusted offense level as being 36. PSR ¶¶ 43-52. With a three-level reduction for his timely acceptance of

¹ The Defendant noted minor objections to four statements contained in the offense conduct portion of the PSR, which objections have been noted and/or addressed in the amended report.

responsibility (PSR ¶¶ 53-54), the Defendant's total offense level is correctly calculated as being 33. PSR ¶ 57.

As noted in the PSR, the Defendant's criminal history category is I. PSR ¶ 62. Hence, his advisory Guidelines sentencing range is 135 to 168 months (PSR ¶ 98) and up to a life term of supervised release (PSR ¶ 100). The Guidelines also provide, however, that upward departures may be appropriate where, as here, the offense(s) created a substantial risk of death or serious bodily harm to more than one person and if the motive behind the offense(s) was to intimidate or coerce a civilian population. (PSR ¶¶ 112, 113).

As noted in the amended PSR, the parties have agreed (and the Court has accepted) a binding sentencing range of 27-32 years, along with a life term of supervised release. PSR ¶ 99.

B. Step Two: Consideration of the Factors Under 18 U.S.C. § 3553

When fashioning an appropriate sentence, a court must not only considered the advisory Guidelines, but must consider the factors identified in 18 U.S.C. § 3553(a).² The factors a sentencing must consider are the nature and circumstances of the offense and the history and characteristics of the defendant. The sentencing court must also consider, *inter alia*, the need for the sentence imposed to: reflect the seriousness of the offense; promote respect for the law; provide just punishment; afford adequate deterrence to criminal conduct; protect the public

² "This requirement does not necessitate a specific articulation of each factor separately, but rather a showing that the district court considered the statutorily-designated factors in imposing a sentence ." *See United States v. Knows His Gun*, 438 F.3d 913, 918 (9th Cir.2006). *See also Rita v. United States*, 551 U.S.338 , 127 S.Ct. 2456, 2462 (2007).

1 from further crimes of the defendant; provide the defendant with needed
2 educational training, medical care, or other correctional treatment.

3 In the matter *sub judice*, the relevance of the factors identified in 18 U.S.C.
4 § 3553(a) is to determine an appropriate sentence within the agreed sentencing
5 range of 27-32 years. The United States respectfully and strongly recommends
6 that the appropriate sentence is a term of imprisonment of 32 years.

7 1. Nature and circumstances of the offenses

8 The nature of the offense is extremely troubling. The egregious nature of the
9 Defendant's conduct, which could have led to death and massive injuries to a large
10 number of innocent victims is shocking – offenses created a substantial risk of
11 death or serious bodily harm to many innocent persons and were motivated to
12 intimidate or coerce a civilian population. The gravity of the offense cannot be
13 understated.

14 The improvised explosive device was discovered by alert and vigilant
15 citizens inside a backpack the Defendant positioned at a busy Spokane intersection
16 on the route of the Martin Luther King, Jr. Unity March. *See* Attachments A and
17 B (backpack). It was a functioning weapon, designed and constructed by the
18 Defendant. If detonated at the proper time, it would have expelled fishing weights
19 (coated in rat poison containing an anticoagulant) as shrapnel into the march
20 participants and nearby businesses. *See* Attachment C (mockup) and D
21 (demonstration detonation) There is also undisputed evidence that the Defendant
22 successfully manufactured and detonated another explosive device, designed to
23 expel shrapnel (ie: threaded metal nuts) sometime prior to the Unity March. *See*
24 Attachment F.

1 The Defendant took photographs of African Americans (including children)
2 and other racial minorities, who were participating in the march. *See* Attachment
3 E. Clearly, these individuals were targets of his scheme.

4 On balance, this factor plainly weighs in favor of imposing a 32 term of
5 imprisonment.

6 2. History and characteristics of the defendant

7 The Defendant's history and characteristics are vexing to say the least.

8 The Defendant is an admitted white supremacist and has been for some
9 time. He is a member of the National Alliance, white supremacy organization.
10 His twisted views are memorialized in numerous posts on the Vanguard News
11 Network forum, a know white supremacist website. *See* Attachment J. His views
12 are known to his family members as well other professed racist organizers.
13 Moreover, even since being held pre-trial he has continued to communicate with
14 Glenn Miller, a known white supremacist. *See* Attachment K.

15 The FBI seized numerous racist books and periodicals from his belongings
16 at his father's premises. They also seized numerous domestic terrorism related
17 books.

18 In addition, at the time of his arrest he was in possession of an AK47, a
19 handgun, and a modified digital clock as a timing device. *See* Attachment G.

20 This factor, in conjunction with the facts that the Defendant acted out on his
21 racist views, supports the imposition of a sentence that will maximize the time the
22 Defendant is incarcerated and subject to judicial oversight.

23 3. Reflect the seriousness of the offense

24 It goes without saying that the offenses committed by the Defendant were
25 gravely serious. He was motivated to intimidate or coerce the public and he
26

1 created an extremely serious risk of death or serious bodily harm to many innocent
2 persons.

3 This factor militates in favor of a 32 year sentence and life term of
4 supervised release.

5 4. Promote respect for the law

6 Although the Defendant has no prior criminal history, here he had to have
7 seriously reflected on his actions and planned to cause public disruption, serious
8 injury, and potentially death. This is demonstrated by his fastidious and precise
9 manufacturing of the device. It is clear that the Defendant went to great effort to
10 ensure the device operated as designed – to expel shrapnel coated in rat poison
11 into the participants in a public unity march. Indeed, he even went to the extent of
12 detonating another shrapnel-expelling-device prior to the unity march.

13 This factor similarly weighs in favor of a 32 years sentence.

14 5. Provide just punishment

15 The Defendant needs to be punished for his serious conduct.³

16
17 ³ The Defendant relies on two other cases – one prosecuted in the
18 Southern District of New York and the other in the Northern District of Dallas – to
19 argue that 27 years is an adequate sentence because a sentencing court must
20 consider “the need to avoid unwarranted sentencing disparities among defendants
21 with similar records who have been found guilty of similar conduct.” 18 U.S.C. §
22 3553(a)(6). What the Defendant fails to acknowledge is that he is not similarly
23 situated nor is he guilty of similar conduct. It is unclear what other charge those
24 defendants were facing and in neither of those cases did the defendants plan,
25 manufacture, test, or place a functional device that undoubtedly could have
26 injured, maimed, or killed innocent people. Here, a 32 year sentence will in no

1 A 32 year sentence will provide adequate punishment that supports the purpose
2 and policy of the Federal Sentencing Act, 18 U.S.C. § 3553(a).

3 6. Afford adequate deterrence to criminal conduct

4 This Court has a unique opportunity to send a message to other white
5 supremacists who may be contemplating acting out on their intolerant, racist
6 views. The public needs to know that the Federal courts will not condone conduct
7 like that of the Defendant. Such conduct will not be tolerated, particularly in the
8 greater Spokane area. Indeed, the greater Spokane area, including North Idaho,
9 has in recent years been a hot bed for white supremacists. It has not been long
10 since the Aryan Nation compound in Hayden Lake Idaho was finally shuttered, but
11 others, like the Defendant, have remained in the area. Imposing a 32 year sentence
12 is a substantial but needed punishment and will prevent and hopefully deter the
13 Defendant and others from similar criminal acts in the future.

14 7. Protect the public from further crimes of the Defendant

15 The Defendant has demonstrated his very firm convictions about white
16 supremacy. *See* Attachments H and I. He has also demonstrated that he will act
17 out on those convictions in an act of domestic terrorism (which he has an intent in)
18 even if innocent people are randomly injured or killed. It is unlikely that his views
19 will change in the short term and plainly the public needs to be protected from

20 _____
21 way create an unwarranted sentencing disparity.

22 Interestingly, in the Defendant's Sentencing Memorandum he argues in
23 support of his disparity assertion that the Guidelines sentencing range is less than
24 half of the 27 year sentence he seeks. What the Defendant fails to articulate is the
25 Guidelines expressly provide that an upward departure may be appropriate in
26 circumstances tantamount to what occurred here.

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1 further crimes he may commit. The public needs assurances that the Defendant
2 will not, because he cannot, disrupt community events or target individuals based
3 on his racist views again. The public should not have to be concerned about the
4 Defendant for the next 32 years.

5 8. Provide educational training, medical care, or other correctional
6 treatment

7 This factor weighs in favor of fashioning a sentence that includes, along
8 with the standard terms of release, mental health counseling/treatment and
9 submitting to the search of the Defendant's person, residence, office, and vehicle,
10 which suggested special conditions are set forth in the Addendum to the PSR.

11 **CONCLUSION**

12 Based on the foregoing, the United States respectfully submits that this
13 Court should impose a 32 year term of imprisonment to be followed by a life term
14 of supervised release, subject to the suggested special conditions set forth in the
15 Addendum to the PSR. The United States submits that such a sentence is
16 "reasonable" under the grave facts and circumstances of this case and not greater
17 than necessary to promote the purpose and policy of the Federal Sentencing Act,
18 18 U.S.C. § 3553(a).

19 DATED November 23, 2011.

20 Michael C. Ormsby
21 United States Attorney

22 *s/Joseph H. Harrington*

23 Joseph H. Harrington
24 Assistant United States Attorney

25 Thomas O. Rice
26 Assistant United States Attorney

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2 I hereby certify that on November 23, 2011, I electronically filed the
3 foregoing with the Clerk of the Court using the CM/ECF System which will send
4 notification of such filing to the following, and/or I hereby certify that I have
5 mailed by United States Postal Service the document to the following non-
6 CM/ECF participant(s):

7
8 Mr. Roger Peven
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14 *s/Joseph H. Harrington*

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